Kentucky Law Journal

Volume 33 | Issue 4 Article 6

1945

Early Causes and Development of the Doctrine of Mens Rea

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EARLY CAUSES AND DEVELOPMENT OF THE DOCTRINE OF MENS REA

As the power of the Roman Empire declined and the advantages of the *Pax Romana* were lost, the primitive peoples of northern and western Europe were free to exercise their own ideas of life and government. Single individuals through sheer force of arms became all powerful, and there developed on the continent of Europe and the island of Britain what is known as the feudal system. The peasant who had, and could acquire no power of his own, was forced to turn to some feudal lord for protection. He who wished to survive had to protect himself with the sword against all comers. Law and order were virtually unknown, and it is no wonder that there grew up under these conditions a system in which each noble was a law unto himself.

Early records are few in number, and, while it is necessary to use our imagination about some of the factors of this early period, we must be careful not to stray from the actual facts and conditions of the time. The Church prior to the time of Augustine, had practically no influence in England.[1] Primitive ideas and superstitions were rampant.[2] The theory of an "eye for an eye", while probably not practiced wholly, was pretty much the custom, and a system imposing almost absolute liability was prevalent.[3] A man was liable

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[1] Clifford, *Augustine* in 2 THE CATHOLIC ENCYCLOPEDIA (Special edition, 1913) 81.

[2] "One need not here call to mind in detail the characteristics of primitive culture; only certain of the more germane may be noted. The idea of transgression as associated with ceremonial observances; the propitiation of deities by gifts and sacrifices; the sense of pollution and contamination (as by the touching of blood or of a corpse); the appeal to a decision of the Diety or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the engaging in formal combat); the arbitrary formalism of words and phrases in pleading and oaths, these give the tone to the times." Wigmore, *Responsibility for Tortious Acts: Its History* (1894) 7 HARV. L. REV. 315, 316-317.

[3] "The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for. It is only in a few exceptional cases that such an act need not be paid for." 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 51.

"Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 470.

"Legal Historians tell us that in the earliest period of our law the mental state of the wrongdoer was little, if at all, regarded, and that no mental element was required to establish his liability." Turner, *The Mental Element in Crimes at Common Law* (1936) 6 CAMB. L. J. 31, 34.

not only for his own acts but also for those of his servants, his animals and even for inanimate objects owned by him.[4]

Revenge was one of the chief objects in the minds of those who had been injured or whose relatives had been killed.[5] Gradually, however, vengeance came to be wreaked upon the guilty animal, slave or thing rather than upon the individual, although he did not always escape punishment. In such cases the guilty thing was destroyed and primitive minds considered this adequate revenge.[6] It is difficult to tell just when one type of punishment entered the law, such as it was, and another went out. Probably outlawry and blood-feud were the first in appearance. Noxal surrender was very likely a later development, although it can not be said that it wholly displaced the other two. Rather, it must be pointed out that they served different functions, and existed, for a time at least, side by side. It is certain that all of these existed at the time of Alfred, over a hundred years before the Norman conquest.[7]

As time passed and kings gained new powers, the church also gained influence and its power was felt throughout the continent and in England. All life centered around this new, invigorating force. Towns grew up in which the church building was the central edifice, and to whose spires and teachings men turned for new life, new ideas. If this power did not at one time surpass that of the various kings, it did for a period of several centuries, give them serious worry and cause for apprehension. Charlemagne, for example, realized the advantages to be gained, from the standpoint of influence with his subjects, from being crowned by the Pope; and

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[4] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1923) 51–52; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 472-473.

[5] "A consideration of the earliest instances will show, as might have been expected, that vengeance, not compensation, and vengeance on the offending thing, was the original object." HOLMES, THE COMMON LAW (1881) 34.

"It is clear that early criminal law developed out of the blood-feud and rested upon the desire for vengeance." Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 975.

[6] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1923) 52-53; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 472-474.

[7] "On the eve of the Norman Conquest what we may call the criminal law of England . . . contained four elements which deserve attention; its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood-feud, of the tariffs of *wer* and *bot* and *wite*, of punishment in life and limb. As regards the malefactor, the community may assume one of four attitudes: it may make war upon him, it may leave him exposed to the vengeance of those whom he has wronged, it may suffer him a determinate punishment, death, mutilation, or the like." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 449.

the power of St. Augustine and Thomas a Becket in England cannot be ignored.

With these factors in view it is not difficult to understand or comprehend that the Church should in a significant way leave its mark also upon the development of the law. Few men outside of the Church were educated, and it was in connection with the Church that the great universities on the continent of Europe and later in England developed. Their writings were the first to come forth after the obscured days of the middle ages. These men studied, among other things, both Roman and Canon law.[8] Emphasis was placed upon the individual, his sins, his thoughts, and his morals. When a wrong had been committed, the moral blameworthiness of the wrongdoer was considered, and it was thought better to punish with various penances and fines than with death.[9]

As the teachings of the universities spread, and as the Church and State became more closely connected, we find the common law of England more and more tempered with Roman and Canonist theory.[10] Undoubtedly the teachings of Roman law in the various universities had some effect upon thinking men, for we find the Roman *culpa* and *dolus* mentioned in their writings, and it is probably true that the students in studying Roman law consciously or unconsciously compared it with their own meager law.[11]

While we must be careful not to read too much into early law that is not in fact there, we can note that there was often a distinction made between various crimes as far as the punishment of those crimes was concerned.[12] Outlawry seems to have been reserved for

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[8] Sayre, *Mens Rea* (1932) 45 HARV. L. R. 974, 982-984. But see Levitt, *The Origin of the Doctrine of Mens Rea* (1922) 17 ILL. L. REV. 117, 117-118 to the effect that ". . . the Roman law itself did not contribute very much to our criminal law. The great Roman jurists wrote very little about criminal law."

[9] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 53; Levitt, *The Origin of the Doctrine of Mens Rea* (1922) 17 ILL. L. REV. 117, 135-137; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 452 and 476.

"Canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt." Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 980.

[10] Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 982-984.

[11] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 477.

[12] "In a yet early age law begins to treat intentional as worse than unintentional homicide. In either case the *wer* is due; but in the one there can; in the other there can not, be a legitimate feud." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 471.

" . . . the intent of the defendant seems to have been a material factor, even from the very earliest times, in determining the extent of punishment." Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 981.

the most severe crimes, blood-feud and noxal-surrender for the less severe crimes.[13] Of a later development, but growing up with these other modes of punishment, was that of compensation to the relatives of the deceased man or to the king or to both.[14] Compensation was voluntary at first, but gradually as an elaborate system of tariffs was set up it became obligatory and the amount to be paid varied with the offense committed and with the rank of the injured person.[15]

Slowly as men attempted to distinguish one type of crime from another, they were forced to draw more exact lines between the mental elements necessary for each crime. Such distinctions were probably not made with any very definite thought about intent or lack of intent.[16] Gradually, however, relief from strict punishment

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[13] "Among our English forefathers, when they were first writing down their customs, outlawry was already reserved for those who were guilty of the worst crimes." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 450.

[14] "We cannot understand either the amount of the wergild or the method of its payment unless we remember that it took the place of the feud, and that the feud was always in the background to be resorted to if the money was not paid. . . . Its payment and receipt was in the nature of a treaty between opposing clans." 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 45.

"Outlawry and blood-feud alike have been retiring before a system of pecuniary compositions . . . (although) from the very beginning . . . some small offences could be paid for . . ." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 451.

[15] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 44.

"It would have life or lives for life, for all lives were not of equal value. . . ." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 450.

[16] "In seeking to determine the part played by intent in the early criminal law, . . . one must guard against drawing too sweeping conclusions from evidence which is admittedly extremely meager. What the recorded fragments of early law seem to show is that a criminal intent was not always essential for criminality and many malefactors were convicted on proof of causation without proof of any intent to harm. But it also appears that even in the very earliest times the intent element could not be entirely disregarded, and, at least with respect to some crimes, was of importance in determining criminality as well as in fixing punishment." Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 982.

Objective standards were used in determining moral guilt, and the question was not whether the wrongdoer believed that his act had been right or wrong, but whether the court which tried him thought that it was in accord with standards which it recognized and "those standards necessarily involved recognition of a mental element in the matter and so the state of a wrongdoer's mind, actual or presumed, came to be relevant." Turner, *The Mental Element in Crimes at Common Law* (1936) 6 CAMB. L. J. 31, 35.

"There is no reason to suppose that in early times English law had any subtle analysis of the mental element in liability. But that is far from saying that it possessed no ideas whatever on the topic. It had a long list of objective facts which made a man amenable to its penalties, and occasionally it stated circumstances in which he was

for all evil done by a person was changed through procedural means. Thus, courts continued to convict under the old laws, but the king began to pardon and thus to save lives. Such procedure was beginning to be quite common by the thirteenth century, especially where one had killed in self-defense or through misadventure.[17] Here again we are not certain that it was a lack of *mens rea*, or guilty intent of the accused, that was the governing factor, but certainly if it was not, it must be conceded that something closely akin to it was a factor in such cases.

The first specific mention of *mens rea* that we know of is in the writings of St. Augustine.[18] It is believed that there was some intervening writer, but the next known appearance of the phrase is in the *Leges Henrici*.[19] Bracton, who powerfully influenced the shaping of the common law, and who was strongly saturated with canonist ideas, used the phrase in his book which was written in the thirteenth century.[20] While the term *mens rea* has had no fixed, continuing meaning in law, its importance has been noted and its influence felt ever since the twelfth century. Its meaning has changed

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free from liability. But the very fact that it could, and did, draw the distinction between 'liable' and 'not liable' shows that it must have considered at least subconsciously the state of a man's mind when he acted, or did not act, in a given set of circumstances." Winfield, *The Myth of Absolute Liability* (1926) 42 L. Q. REV. 37, 37.

[17] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 479-484; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 980.

[18] *"Ream linguam non facit nisi mens rea."* 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 476, citing S. Augustinus, Sermones, No. 180, c. 2 (Migne, Patrol. Vol. 38, col. 974).

". . . The passage in which the maxim, 'Ream linguam non facit nisi mens rea" is found is a part of a sermon on the Epistle of James, 5:12 (Swear not neither by heaven nor by the earth, neither by any other oath; etc.) and the second chapter of the Sermon, (sermon 180) discriminates cases of perjury. Augustine takes the case of a man who is asked if it rained in a certain spot. The man supposes that it did not rain, but considers it to his interest to testify that it did really rain. In fact it did rain there, but the man was ignorant of that fact, and thinks it did not rain. Augustine says the man is a perjuror. The point of concern is how far the word comes from the mind. It does not make the tongue guilty unless the mind is guilty. The transition from word to act would be an easy one in mediaeval days. This would be particularly true when the purpose for ascertaining whether or not there was a guilty mind was the same whether the external manifestation was a word or a deed." Levitt, *The Origin of the Doctrine of Mens Rea* (1922) 17 ILL. L. REV. 117, footnote 1.

[19] *"Ream non facit nisi mens rea."* 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 476, citing *Leges Henrici* 5, sec. 28.

[20] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 477-478; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 984-987.

with the times and changing conceptions and ideas of what constitutes criminal justice.[21]

We can note particularly the importance of intent in the growing differentiation between crimes and torts.[22] We can discern its importance in the defenses of infancy and insanity which were to have more and more weight given to them.[23] Following the reasoning set forth by Bracton, we find Coke and Hale in the seventeenth century, emphasizing the importance of the mental element in crimes.[24]

Thus it is that we can trace from an almost imperceptible beginning the development and growth of *mens rea* in the law of crimes, which, regardless of its merits, has left its imprint; an element which has and will continue to change and develop with time and an advancing civilization.

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[21] Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 1016-1017.

"It must not be supposed, however, that the Latin maxim has always meant what it is taken to indicate nowadays." Turner, *The Mental Element in Crimes at Common Law* (1936) 6 CAMB. L. J. 31, 31-32.

[22] In early times there was no distinction between criminal and tort law. Pollock, *English Law before the Norman Conquest* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 88, 99; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 449; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 989-990.

[23] Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 989.

[24] Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 989-1016.